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In The

Supreme Court of The United States

October Term, A. D. 1942

No. 573

CHARLES M. THOMSON, Trustee of the CHICAGO AND NORTH WESTERN RAILWAY COMPANY (substituted for Charles P. Megan, Trustee),
Petitioner,

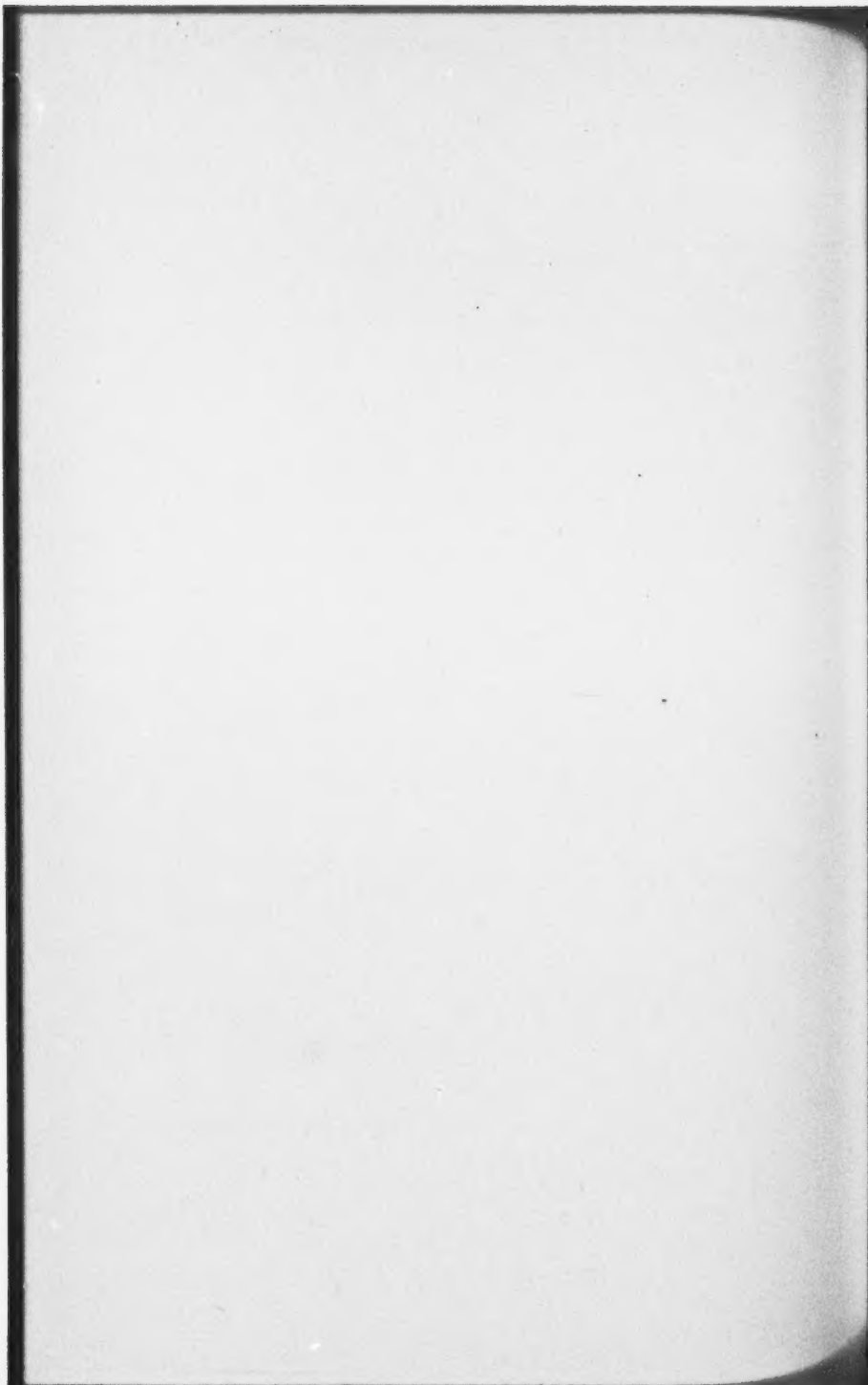
vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF THE STATE OF ILLINOIS, AND SUPPORTING BRIEF.

William T. Faricy,
Nelson J. Wilcox,
Counsel for Petitioner.

Brennan J. Slater,
Of Counsel.



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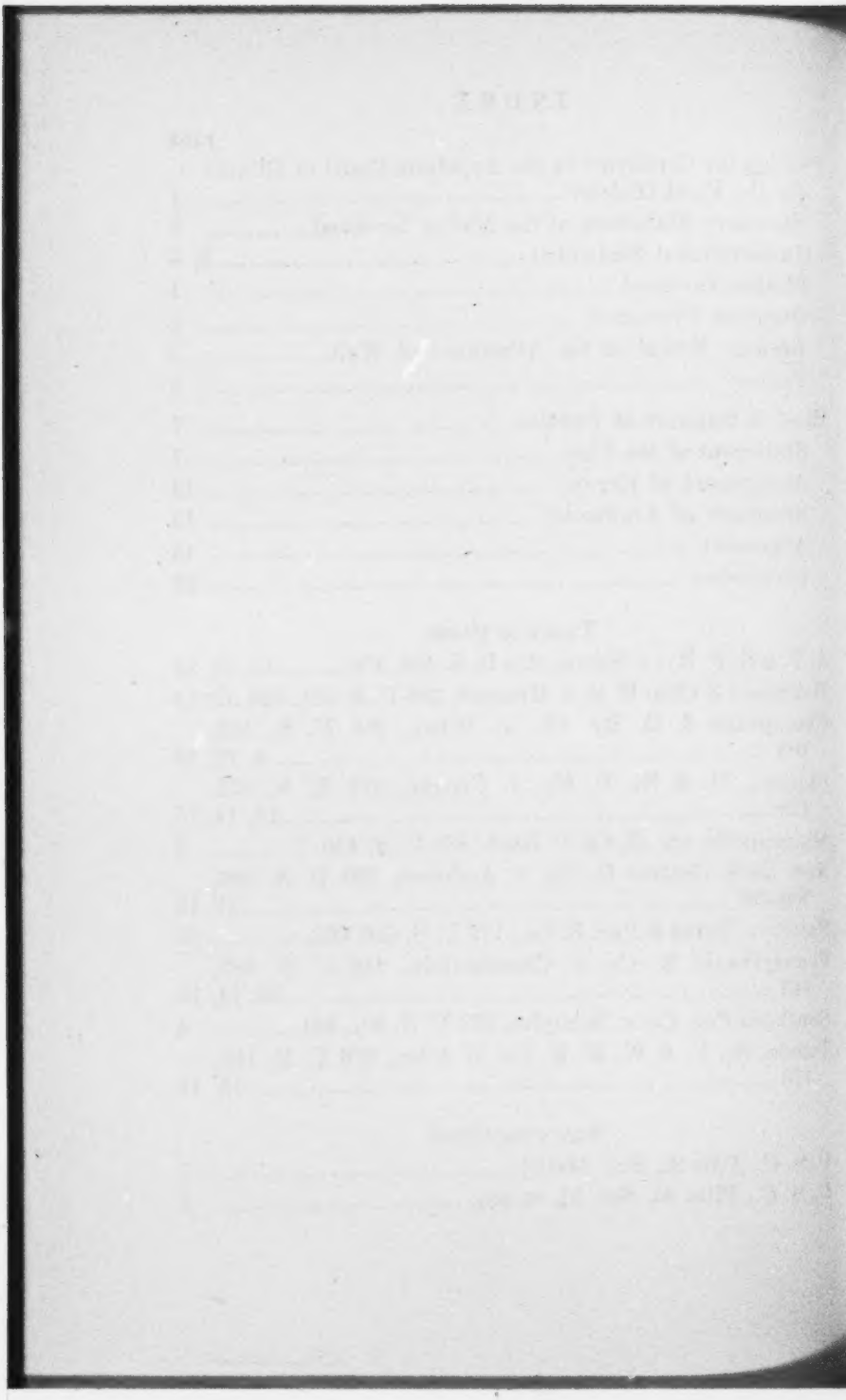
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No. .....

CHARLES M. THOMSON, Trustee of the CHICAGO AND NORTH WESTERN RAILWAY COMPANY (substituted for Charles P. Megan, Trustee),

Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF THE STATE OF ILLINOIS, AND SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

Charles M. Thomson, Trustee of Chicago and North Western Railway Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit based on the Federal Employers' Liability Act, filed and tried in the Superior Court of Cook County, Illinois. Albert E. Sevier, Respondent's intestate, was em-

ployed in interstate transportation by Charles M. Thomson, Trustee of the Chicago and North Western Railway Company. On the night of May 21, 1937, Sevier was working as head-end brakeman on petitioner's freight train. The train stalled (stopped) while going up a hill and the engineer made unsuccessful attempts to get up the hill (R. 14, 15). Sevier, who was riding in the engine cab, went back to make a cut so the train would be in two parts, thus permitting the first section to be taken on up the hill separately (R. 18). At the place where he had decided to make the cut Sevier signaled the engineer with his lantern to slack back so that the cars could be uncoupled (R. 19). During the backing movement Sevier's lantern was seen to disappear (R. 21). The engineer went back to investigate and found Sevier crushed to death between the couplers of the cars where he had made the cut (R. 17). There were no eyewitnesses to the accident. The accident could only have happened, however, by reason of the failure of Sevier to set the brakes on the rear section before signaling the engineer to slack back. As a result of this failure, when he uncoupled the cars the rear section started to move back down the hill (R. 48, 50, 54, 55, 62, 77, 78, 89-91, 94, 96-97, 99, 107, 112-114, 116, 117). To stop it Sevier must have gone between the two sections and applied the brake on the rear car of the rear section, thus suddenly stopping it and while doing this he was caught between the stopped rear section and the backing forward section and crushed to death (R. 16, 17, 26, 27, 29, 48, 50, 54, 55, 72, 77, 78, 89-91, 94, 96, 97, 99, 107).

The case was tried on two different occasions in the Superior Court of Cook County, Illinois. Upon the first trial respondent had a verdict and judgment for $15,000.00. A new trial was granted and the Appellate Court of Illinois, an intermediate court of review, affirmed the order granting the new trial (R. 168). Upon the second trial respondent

had a verdict and judgment for $20,000.00 (R. 9) and petitioner appealed from that judgment. The Appellate Court affirmed the judgment (R. 171). By order of the Appellate Court, its opinion was directed not to be published in full, 314 Ill. App. 382. Within the time permitted by law, petitioner filed a petition for leave to appeal to the Supreme Court of Illinois and that court denied such petition (R. 173), thereby making the judgment of the Appellate Court of Illinois final. This petition for certiorari follows.

JURISDICTIONAL STATEMENT.

1. Plaintiff's cause of action, if any, and defendant's defenses, if any, depend upon the provisions of 35 Stat. 65, Ch. 149 (U.S.C., Tit. 45, Secs. 51 to 59), known as the Federal Employers' Liability Act. The complaint of plaintiff specifically refers to and is based on the Federal Employers' Liability Act (R. 4). Defendant's answer denies liability under this Act (R. 11, 12). The instructions to the jury, verdict, judgment, decision of the Appellate Court affirming the judgment, and denial of leave to appeal by the Supreme Court of Illinois (R. 9, 133-146, 168-171, 173), are all based upon the Federal Employers' Liability Act.

A final judgment has been rendered by the highest court of Illinois in which a decision could be had involving rights, privileges, and immunities specifically set up and claimed by both parties under the Constitution and statute of the United States (35 Stat. 65). This court, therefore, has jurisdiction to review by virtue of Section 344(b) (Judicial Code, Sec. 237, amended), U.S.C.A. 28. The opinion of the Appellate Court appears at pages 168 to 171 of the transcript of record. No opinion was filed by the Supreme Court of Illinois.

2. The date of the decision of the Appellate Court of Illinois sought to be reviewed is April 20, 1942 (R. 168). That is not the date, however, from which the statutory

period of time within which to make application to this court for writ of certiorari is to be computed. That date is September 18, 1942 as appears from the following:

After the rendition of the Appellate Court decision, petitioner herein petitioned the Supreme Court of Illinois for leave to appeal from the Appellate Court decision, but the Supreme Court of Illinois denied the application by order duly entered September 18, 1942 (R. 173).

3. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions relied upon.

4. Cases believed to sustain the jurisdiction are *Minneapolis, etc. R. Co.* v. *Rock,* 279 U. S. 410, *Chesapeake & O. R. Co.* v. *Mihas,* 280 U. S. 102, *and Southern Pac. Co.* v. *Schuyler,* 227 U. S. 601, 611.

STATUTE INVOLVED.

The case arises under the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51, et seq.).

THE QUESTION PRESENTED.

Is there any evidence in the record legally tending to prove that negligence on the part of petitioner proximately caused or contributed to cause the death of respondent's intestate?

This question was decided by the Appellate Court of Illinois adversely to petitioner. It is our contention that in doing so the Appellate Court (a) failed to familiarize itself with or understand the facts, (b) gave no consideration to the essential facts, (c) gave the ruling Federal court decisions no consideration, and (d) found as facts the imaginative contentions of counsel for respondent.

We contend (1) that there is no evidence in the record legally tending to prove that negligence on the part of the petitioner was the proximate cause of the death of respondent's intestate, and (2) that the conduct of respondent's intestate in failing to set the brakes on the rear section before uncoupling the cars was the sole, primary and efficient cause of his death.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Appellate Court of Illinois has decided Federal questions of substance in conflict with the applicable decisions of this Court, to-wit:

A. In allowing respondent to recover where there was no negligence shown on the part of petitioner.

B. In allowing respondent to recover where the conduct of respondent's intestate was the sole cause of his death.

The instant case comes plainly within the purview of the following rule of this Court, as to what reasons will be considered for granting a writ of certiorari: Rule 38 5(a), "Where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court."

PRAYER.

WHEREFORE, Petitioner prays that a writ of certiorari be issued by this Court, directed to the Appellate Court of Illinois, First District, commanding that court to certify and send to this Court a transcript of the record in the case entitled "Mary B. Sevier, Administratrix of the Estate of Albert E. Sevier, deceased, Appellee, v. Charles M.

Thomson, Trustee of the Chicago and North Western Rail way Company, Appellant, number 41808," including also the proceedings in said Appellate Court, together with the Illinois Supreme Court's denial of petitioner's request for leave to appeal, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower court be reversed.

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